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**In the Supreme Court
OF THE
United States**

OCTOBER TERM, 1955

No. [REDACTED] 48

UNITED STATES OF AMERICA for the Benefit and on
Behalf of HARRY SHERMAN, CHAS. ROBINSON,
RONALD D. WRIGHT, STUART SCOFIELD, LEE
LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL
LAWRENCE, GORDON POLLOCK and HAROLD SJO-
BERG, as Trustees of the Laborers Health and
Welfare Trust Fund for Northern California,

Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G.
CARTER, Doing Business as Carter Construction
Company, CARTER CONSTRUCTION COMPANY and
HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.**

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 752

UNITED STATES OF AMERICA for the Benefit and on
Behalf of HARRY SHERMAN, CHAS. ROBINSON,
RONALD D. WRIGHT, STUART SCOFIELD, LEE
LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL
LAWRENCE, GORDON POLLOCK and HAROLD SJO-
BERG, as Trustees of the Laborers Health and
Welfare Trust Fund for Northern California,

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DONALD G. CARTER, Individually; DONALD G.
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Company, CARTER CONSTRUCTION COMPANY and
HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the
United States, and to the Honorable Associate
Justices of the Supreme Court of the United
States:

Respondent, Hartford Accident and Indemnity Co.,
prays for an order denying the petition for a writ
of certiorari on file herein.

OPINION BELOW.

The opinion of the Honorable Louis Goodman, United States District Judge, is set forth as Appendix A hereto.

QUESTIONS PRESENTED.

Both in the Trial Court and upon appeal to the United States Court of Appeals for the Ninth Circuit, petitioners sought to recover liquidated damages and attorneys' fees as provided for in the trust agreement between themselves and the contractor. Neither Court found it necessary to determine those issues. If this Honorable Court makes its order granting the petition, the following questions will be presented for review:

1. Where the principal on a Miller Act bond has covenanted that he will make monthly payments into a Health and Welfare Trust Fund, upon his default is his surety liable therefor?
2. Where the principal on a Miller Act bond has covenanted that he will pay liquidated damages in the event of his failure to make monthly payments into a Health and Welfare Trust Fund, upon his default may the Trustees recover said liquidated damages from his surety?
3. Where the principal on a Miller Act bond has covenanted that he will pay attorneys' fees in the event of his failure to make monthly payments into a Health and Welfare Trust Fund, upon his default may the Trustees recover said attorneys' fees from his surety?

STATEMENT OF THE CASE.

At the time that Donald G. Carter became a bankrupt (R. 41), he had paid all of the wages required by him to be paid under his contract with the United States in full and without deduction of any kind (R. 13-14). Article II, Section 3 of the Trust Agreement provides that the unpaid contributions which the petitioners herein seek to recover shall not be deemed wages, and that the employee-beneficiary shall not be entitled to receive any part thereof (Exh. C, R. 21). Section 4 of the same Article provides that the employee-beneficiary shall have no title or interest to the Fund other than provided in the Trust Agreement, and Section 2 of Article VIII provides that no employee-beneficiary shall have a right to any benefits under the Health and Welfare Plan except as specified in the policies or contracts procured thereunder. The Fund provides benefits for the families of workers as well as the workers themselves (Petitioners' Brief, p. 4). A worker need not work on any specific project to qualify for benefits, and may enjoy them even though he is no longer working (R. 40).

The issues presented to the Courts below had not before been decided by a Federal Court. A United States District Court, in an Opinion published on January 23, 1956, has decided that contributions to a Union welfare fund are not wages due to workmen within the meaning of 11 U.S.C.A. 104(a)(2), and are therefore not entitled to prior payment out of the bankrupt's estate.*

**In re Brassel*, U.S.D.C. N.D.N.Y., 135 F. S. pp. 827.

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**THE PETITION FOR CERTIORARI
SHOULD BE DENIED.**

The petitioners first argue that the writ should issue because of the increasing importance of welfare funds to the individual laborer. This may be conceded; but "Certiorari is granted only in cases involving principles the settlement of which is of importance to the public and distinguished from that of the parties, * * *" (*National Labor Relations Board v. Pittsburg Steamship Company*, 340 U.S. 498, 95 L. ed. 479).

As their next argument, the petitioners state that it is important to the United States that their petition be granted for the reason that if contractors refuse or fail to make contributions to the welfare funds, their workers will strike, resulting in delays on Federal construction projects. The answer is that the Miller Act requires that contractors also furnish a performance bond; Carter did so (R. 13-14, Exh. A).

The petitioners finally argue that the Circuit Court, by its decision, has given a literal interpretation to the Miller Act, whereas this Court has heretofore held that said Act shall be liberally construed; and, whereas the Circuit Court held that the petitioners herein were not persons who had furnished labor and hence could not bring an action under the Miller Act, this Court has heretofore held that assignees of those who have furnished labor may bring actions on Miller Act bonds. Both arguments proceed from the wholly erroneous premise that the Circuit Court's "Decision was grounded solely and squarely upon the fact that

if the Miller Act is read and applied literally, 'recovery on a Miller Act bond is limited to persons who have "furnished labor or material in the prosecution of the work provided for in the contract" ' ". (Petitioner's Brief, p. 14). As clearly appears from its opinion, the Circuit Court held that recovery could be had only by a person who had furnished labor and material and that said recovery was necessarily limited to that which was "justly due". After pointing out that the contractors and the union had specifically agreed that the contributions were not to be considered wages and that the employees of the former were to have no interest in any part thereof, the Court said, "*Even if we were to assume that they were authorized to maintain the action for and on behalf of persons who furnished labor, recovery could not be had because the delinquent payments sought to be recovered are not 'sums justly due' the persons who furnished the labor.*" (Petitioner's Brief, Appendix A). It is therefore abundantly clear that the true basis for the Circuit Court's opinion was that there was nothing due the workers which they or their assigns could recover.

The Miller Act and its predecessor, the Heard Act, have been before this Court many times. In *Brogan v. National Surety Company* (246 U.S. 257, 38 S.C. 250, 62 L. ed. 703), the conditions essential to recovery on the bond were said to be that the labor or materials must be "necessary to and wholly consumed in the prosecution of the work provided for in the contract and bond". Here, the undisputed facts are that the

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workers were paid in full for the necessary labor which they furnished and which was consumed in the prosecution of the work. They had no interest in the contributions which were to be made by Carter, and those contributions bore no relationship whatsoever to the prosecution of the work which Carter undertook to perform for the United States. Nothing was due his workers and they had no claim which they could prosecute or assign to others. Such was the holding of the United States District Court and such was the judgment of the United States Court of Appeals for the Ninth Circuit.

As this Court said in *MacEvoy Company v. The United States* (322 U.S. 103, 88 L. ed. 1163, 64 S.C. 890),

“The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate Congressional intent to protect those whose labor and materials go into public projects, (citing cases) but such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds.”

(Emphasis added.)

CONCLUSION.

The decision of the Court of Appeals does not conflict with the decisions of this Honorable Court. The undisputed facts establish that nothing was due Carter's workers which could ground a claim against his surety. The Court below rightly decided the issue

under the applicable decisions of this Honorable Court.

Dated, San Francisco, California,
April 4, 1956.

ROBERT J. DREWES,

DINKELSPIEL & DINKELSPIEL,

*Counsel for Respondent, Hartford
Accident and Indemnity Co.*

(Appendix Follows.)

Appendix

[Title of Court and Cause.]

ORDER RE MOTIONS FOR SUMMARY JUDGMENT.

This is an action by the use-plaintiffs, under the Miller Act, 40 USC §270a, to recover from Carter Construction Company, (now defunct) and the surety on its bond, employee health and welfare contributions, which a collective bargaining agreement in the construction trade required the construction company to make to the Union and which it failed to pay.

Both sides have moved for summary judgment.

It is conceded that no issue of fact is tendered.

In my opinion, the use-plaintiffs, relying, as they do, upon the doctrine favoring a liberal construction of the Miller Act, here ask the statute to be stretched far beyond the limits of its objectives and purposes. Neither the language nor the purpose of the Miller Act permits the Act to be applied as plaintiffs ask.

40 USC §270a was purposed to protect those supplying labor and materials on government jobs substantially in the same way as they are protected under state mechanics' lien laws. §270a specifically provides that the bond required to be provided by contractors is "for the protection of all persons supplying labor and material in the prosecution of the work provided for in such contract."

It is agreed here that the wages of all laborers on the specific government project, with which we

are concerned, were paid in full. The payments here sought to be recovered were payments which the Construction Company, along with all other employers, was obligated to pay to the Union as a health and welfare fund for Union members, under a collective bargaining agreement. They had nothing whatever to do with this specific government job, or, in fact, with any designated job or work.

True, the amount of contribution required of each employer was calculated at so much per hour of the time worked by employees. But that was just a mere method of calculation, nothing more. It applied to all employees for all jobs. The fund itself was a device to maintain harmonious relations between employer and Union. No part of the contributions sought to be recovered had the slightest relationship to or concerned the "prosecution of the work provided for in said contract."

No authority has been cited nor have we been able to find any, which would serve as precedent for extending the reach of the Miller Act to the radical extent sought.

Defendants' motion for summary judgment is granted. The contra motion of plaintiffs is denied.

Dated, January 21, 1955.

/s/ Louis Goodman,
United States District Judge.

[Endorsed] Filed January 21, 1955.